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DEPT PASS USTR FOR SOUTH ASIA - AWILLS/JROSENBAUM/BSTILLMAN

E.O. 12958: N/A

TAGS: ETTC ECON ETRD PREL KSTC MASS IN

SUBJECT: INDIAN COMPANIES REQUIRE ADDITIONAL COMMITMENTS IN HIGH TECH TRADE

REF: A. BRYAN LOPP-MARCO DICAPUA/ROBERT WINSHIP EMAIL

NOVEMBER 11 2004

B. MAYANK BHATT-YASH KANSAL EMAIL NOVEMBER 2 2004

C. 03 NEW DELHI 4810

¶1. (U) Summary. Some Indian companies that buy high tech goods are asking potential U.S. exporters to agree to additional requirements regarding U.S. export controls, in some cases limiting the exporters' ability to sell in the Indian market. The buyers require clauses in sales contracts that state: 1) that U.S. export licenses will be obtained by a prescribed date, or the exporter and agent will be liable for damages to the buyer for late delivery; 2) that the exporter will take full financial and legal responsibility in the event that the exporter does not comply with relevant export licensing regulations; or 3) that licensing for all phases of a project be complete on submission of the bid.
End Summary.

¶2. (U) Embassy recently received indications that U.S. high tech exporters were being subject to unusual contract clauses by Indian public entity importers, requiring the U.S. firms to guarantee delivery times regardless of the status of export license applications. At Embassy's request, the American Chamber of Commerce in India (AmCham) took a survey of its members to determine the extent of the time constraints and export control clauses. Some companies reported problems that affected their ability to do business in India.

Specified Date Clause

¶3. (SBU) Some U.S. companies have reported clauses in purchase agreements that require the delivery of goods within a specified period of time, and impose potential penalties for delays. These delivery dates reportedly are based on the assumption that export licenses will be obtained by the exporter and do not allow for flexibility due to delay or denial of these licenses. For example:

-- Oracle reported that it could not respond to a recent tender from Bharat Electronics Ltd (BEL). BEL required the bidder to guarantee that it will continue their supply/support even in the event that BEL or India comes under sanctions from the U.S. Government. Oracle could not make that commitment and so did not bid, and the sale went to SAP of Germany.

-- Agilent representatives claim that they volunteer time commitments in their bids, and factor in wait times due to licensing requirements. They claim that these commitments do not seriously affect their business.

-- IBM claims that it encountered one such request, though it did not bid on the tender. It provided no details of this tender.

-- Codem Systems was not a respondent to AmCham's survey, but it has reported to the Commercial Service's Advocacy Center that it was penalized by Indian Space Research Organization's (ISRO) Telemetry Tracking & Command Network (ISTRAC) for a licensing delay (Ref A). In this instance, Codem Systems had obtained a TAA 90 days before the contract signing, but the DSP-5 license took longer than expected. ISTRAC would not begin technical discussions of the product until the license was obtained, and ISTRAC nullified the contract due to the delay.

-- Beachcraft, also not a respondent to AmCham's survey, has reported through other sources that the delivery date clause has made it impossible for them to bid successfully (Ref B).

¶4. (SBU) Other companies have reported clauses that put the legal responsibility for obtaining all applicable export licenses on the exporter and seem to absolve the Indian buyer

from legal or financial obligations of not obtaining the license.

-- Sun Microsystems noted a clause in a contract with ISRO which states: "Procedures as required by Law of the Country of Export has been followed and necessary export license has been obtained wherever required as and when the Exporter indemnifies the consignee against any loss or expense he may incur due to any fault of the Exporter in the above matter." (Comment: The Indira Gandhi Center for Atomic Research (IGCAR) recently faced legal action from the U.S. government for buying a product for which the exporter, Technology Option, did not obtain necessary export licenses (Ref C). This clause may be to protect ISRO from legal or financial liability should a similar problem arise in the future. End Comment.)

-- Pratt & Whitney has also reported bid tender clauses specifying that export licenses by the bidder's country of origin are the bidder's responsibility, though the tenders acknowledge that Indian licenses are then the buyer's responsibility. A Pratt & Whitney representative states that this requirement forces them to apply for licenses well in advance of potential bids.

Other Issues

15. (SBU) Though Honeywell Defense has not had any specific problems with licensing deadlines, they report that they face tenders that require three phases be complete on submission: 1) Buy; 2) Buy and assemble; and 3) Build locally with technology transfer. Because Honeywell is unable to obtain licenses to build locally until a formal contract is in place, they report that they lose business when faced with these tender requirements.

Comment

16. (SBU) India has made no international commitments on the openness of government contracts, and most of the examples given above are for contracts involving Indian public sector undertakings (PSU). However, contractual requirements that penalize U.S. companies for adhering to export control regulations seem to run counter to the spirit of the HTCG and NSSP goals. The insertion of these clauses may indicate the confusion that many Indian firms are experiencing in negotiating the complexity of U.S. export control requirements. Greater outreach to Indian buyers might be an effective way to deal with some of the problems that U.S. exporters are experiencing.
BLAKE